

MF 96-1
Tax Type: MOTOR FUEL USE TAX
Issue: Off-Highway Usage Exemption

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

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| THE DEPARTMENT OF REVENUE |) | |
| OF THE STATE OF ILLINOIS |) | Docket # |
| v. |) | License #s |
| TAXPAYER |) | |
| |) | Karl W. Betz |
| Taxpayer |) | Administrative Law Judge |

RECOMMENDATION FOR DISPOSITION

APPEARANCES

ATTORNEY, FOR TAXPAYER.

SYNOPSIS

THIS CASE INVOLVES TAXPAYER (HEREINAFTER THE "TAXPAYER"), A BUSINESS THAT HAULED CARGO FOR HIRE IN COMMERCIAL MOTOR VEHICLES BETWEEN AUGUST, 1987 AND SEPTEMBER, 1992. THE TAXPAYER FILED THREE SEPARATE CLAIMS FOR CREDIT WITH THE DEPARTMENT FOR ALLEGED NON-HIGHWAY USE OF MOTOR FUEL THROUGH UTILIZATION OF A POWER TAKE-OFF (PTO) MECHANISM IN ITS TRUCKS. THE DEPARTMENT PAID THE FIRST TWO CLAIMS AND THEN ASSIGNED AN AUDITOR TO ASCERTAIN THE VALIDITY OF THE ALLEGED NON-HIGHWAY USAGE OF MOTOR FUEL. FOR EACH OF THESE TWO CLAIMS, THE AUDITOR DETERMINED THAT ALL OR PART OF THE CLAIM WAS NOT VALID AND NOTICE OF TAX LIABILITY (NTL) NO. XXXXX WAS ISSUED IN THE AMOUNT OF \$10,226.00 (INCLUSIVE OF TAX, PENALTY AND INTEREST) FOR THE PERIOD OF AUGUST, 1987 THROUGH JUNE, 1989, AND NTL NO.

XXXXX IN THE TOTAL AMOUNT OF \$10,138.00 (INCLUSIVE OF TAX, PENALTY AND INTEREST) WAS ISSUED FOR SEPTEMBER, 1989 THROUGH JUNE, 1991. TAXPAYER FILED A SUBSEQUENT CLAIM FOR THE PERIOD OF JULY, 1991 THROUGH SEPTEMBER, 1992 AND THE DEPARTMENT DENIED THIS CLAIM BY LETTER DATED FEBRUARY 10, 1993. BECAUSE TAXPAYER FILED A TIMELY PROTEST TO EACH ASSESSMENT AND THE CLAIM DENIAL, A HEARING WAS SCHEDULED. THE HEARING ON EACH ASSESSMENT AND ON THE CLAIM WERE CONSOLIDATED BECAUSE OF COMMON ISSUES AND PARTIES. (TR. PP. 4-5).

OWNER, OWNER OF TAXPAYER, TESTIFIED AT HEARING AS DID CONSULTANT, OUTSIDE CONSULTANT. ALSO CALLED TO TESTIFY BY TAXPAYER WAS AUDITOR ISADORE MCDUFFY. MR. GARY LYONS, THE AUDITOR FOR THE SECOND AUDIT PERIOD WAS CALLED BY THE DEPARTMENT TO TESTIFY.

AT ISSUE IN THIS PROCEEDING IS IF TAXPAYER IS ENTITLED TO A REFUND FOR SPECIAL FUEL ALLEGEDLY USED FOR OFF-ROAD PURPOSES. IT IS THE POSITION OF TAXPAYER THAT BECAUSE THE PTO MECHANISMS ON ITS TRUCKS USED FUEL FOR A PURPOSE OTHER THAN LOCOMOTION OF THE VEHICLE UPON THE HIGHWAYS, IT IS ENTITLED TO A REFUND. IT IS THE POSITION OF THE DEPARTMENT THAT TAXPAYER DID NOT SUBMIT SUFFICIENT PROOF TO ESTABLISH THE AMOUNTS OF NON-HIGHWAY USED FUEL FOR WHICH IT APPLIED FOR REFUNDS ON THE RMFT-11 MOTOR FUEL TAX REFUND FORMS. IT IS ALSO THE POSITION OF THE DEPARTMENT THAT TO ALLOW TAXPAYER'S REFUNDS TO STAND WOULD BE A DOUBLE CREDIT SITUATION FOR THE PORTION OF THE FUEL FOR WHICH TAXPAYER HAS ALREADY RECEIVED CREDIT AS A PURCHASE OF TAX-PAID SPECIAL FUEL ON LINE 7A OF THE MOTOR FUEL USE TAX RETURNS (IDR-280S) IT FILED PRIOR TO ITS SUBMISSION OF THE RMFT-11 REFUND FORMS.

FINDINGS OF FACT

AFTER REVIEWING THE TRANSCRIPT OF RECORD, INCLUDING ALL DOCUMENTARY EVIDENCE ADMITTED THEREIN, I MAKE THE FOLLOWING FACTUAL DETERMINATIONS:

1. THE TAXPAYER CONDUCTS BUSINESS OPERATIONS AS A TRUCKING COMPANY BY HAULING SAND, ROCK, COAL, GRAVEL, ETC. (TR. P. 9)
2. TAXPAYER FILED REFUND CLAIMS ON FORM RMFT-11 WITH THE DEPARTMENT FOR ILLINOIS MOTOR FUEL TAX ALLEGEDLY USED FOR PURPOSES OTHER THAN OPERATING VEHICLES UPON THE PUBLIC HIGHWAYS. THE TIME FRAMES FOR THESE REFUND CLAIMS ARE AUGUST, 1987 THROUGH JUNE, 1989; SEPTEMBER, 1989 THROUGH JUNE, 1991; AND JULY, 1991 THROUGH SEPTEMBER, 1992. (DEPT. EX. NOS. 1 AND 2). THE DEPARTMENT INITIALLY APPROVED THE FIRST TWO CLAIMS AND THEN REFERRED THEM TO THE AUDIT DIVISION FOR VERIFICATION WHICH RESULTED IN THE DEPARTMENT PERFORMING AN AUDIT UPON TAXPAYER FOR THE RESPECTIVE TIME FRAMES. (TR. PP. 40-41, 46)
3. FOR EACH AUDIT PERIOD THE AUDITOR REDUCED THE ALLOWABLE AMOUNT OF TAXPAYER'S CLAIM BECAUSE TAXPAYER HAD NOT PROVIDED SUFFICIENT DOCUMENTARY EVIDENCE TO SUPPORT ITS CLAIMED OFF-ROAD USAGE OF MOTOR FUEL (TR. PP. 42-45, 46-47; DEPT. EX. NOS. 1 AND 2)
4. AUDITOR MCDUFFY, FOR THE CLAIM PERIOD OF AUGUST 1987, THROUGH JUNE, 1989 ESTABLISHED A TAX LIABILITY OF \$7,505.00. THIS WAS \$1,506.00 LESS THAN THE \$9,011.00 TAX REFUND AMOUNT APPROVED AND PAID TO TAXPAYER PURSUANT

TO ITS RMFT-11 CLAIM FORM. THE REASON FOR THE \$1,506.00 DECREASE IS BECAUSE THE AUGUST THROUGH DECEMBER, 1987 MONTHS WERE DEEMED TO BE OUTSIDE THE STATUTE OF LIMITATIONS FOR THE AUDIT PERIOD. PURSUANT TO STATUTORY AUTHORITY, THE AUDITOR DID CAUSE TO BE ISSUED A CORRECTION OF RETURNS OR DETERMINATION OF MOTOR FUEL TAX DUE AND THIS SERVED AS THE BASIS FOR NTL NO. XXXXX (DEPT. EX. NO. 1)

5. AUDITOR LYONS ESTABLISHED TAX LIABILITY OF \$8,361.00 FOR THE PERIOD OF SEPTEMBER, 1989 THROUGH JUNE, 1991, AND THIS LIABILITY WAS THE AMOUNT PAID TO TAXPAYER ON ITS ORIGINAL REFUND CLAIM. PURSUANT TO STATUTORY AUTHORITY, THE AUDITOR DID CAUSE TO BE ISSUED A CORRECTION OF RETURNS OR DETERMINATION OF MOTOR FUEL TAX DUE AND THIS SERVED AS THE BASIS FOR THE DEPARTMENT'S ISSUANCE OF NTL NO. XXXXX. (DEPT. EX. NO. 2)
6. TAXPAYER'S CLAIM FOR REFUND OF \$5,637.95 FOR THE PERIOD OF JULY 1991 THROUGH SEPTEMBER, 1992 WAS DENIED BY THE DEPARTMENT ON FEBRUARY 10, 1993. (TR. P. 33; DEPT. EX. NO. 5)
7. WHILE TAXPAYER OFFERED GENERAL TESTIMONY THAT ITS OPERATIONS MIGHT ENTAIL OFF-ROAD USAGE OF FUEL, THE TAXPAYER DID NOT SUBMIT ANY DOCUMENTARY EVIDENCE COMPRISED OF ITS BOOKS AND RECORDS TO SUPPORT ITS POSITION THAT IT USED SOME MOTOR FUEL FOR OFF-ROAD PURPOSES. (TR. P. 3)

8. THE AVERAGE AMOUNT OF TIME ATTRIBUTABLE TO NON-HIGHWAY USE OF FUEL IN THE "TIME STUDIES" SUBMITTED BY TAXPAYER IN CONJUNCTION WITH ITS SECOND AND THIRD CLAIM FOR REFUND APPLICATIONS IS MUCH HIGHER THAN AND CONTRASTS SHARPLY WITH THE AMOUNT OF TIME OF PTO USAGE ADDUCED BY TAXPAYER IN HIS TESTIMONY AT HEARING. (TR. PP. 11, 14; DEPT. EX. NO. 5, P. 4)

CONCLUSIONS OF LAW

SECTION 13 OF THE MOTOR FUEL TAX LAW (35 ILCS 505/13) AUTHORIZES A REFUND WHEN MOTOR FUEL IS LOST OR USED FOR A PURPOSE OTHER THAN OPERATING A VEHICLE UPON THE PUBLIC HIGHWAYS. THIS SECTION STATES IN PERTINENT PART:

THE CLAIM SHALL STATE SUCH FACTS RELATING TO THE PURCHASE, IMPORTATION, MANUFACTURE OR PRODUCTION OF THE MOTOR FUEL BY THE CLAIMANT AS THE DEPARTMENT MAY DEEM NECESSARY AND THE TIME WHEN THE LOSS OR NONTAXABLE USE OCCURRED, AND THE CIRCUMSTANCES OF ITS LOSS OR THE SPECIFIC PURPOSE FOR WHICH IT WAS USED (AS THE CASE MAY BE), TOGETHER WITH SUCH OTHER INFORMATION AS THE DEPARTMENT MAY REASONABLY REQUIRE.

THE DEPARTMENT MAY MAKE SUCH INVESTIGATION OF THE CORRECTNESS OF THE FACTS STATED IN SUCH CLAIMS AS IT DEEMS NECESSARY.

SECTION 13 AUTHORIZES REFUNDS WHEN MOTOR FUEL IS USED FOR A PURPOSE OTHER THAN OPERATING A MOTOR VEHICLE UPON THE PUBLIC HIGHWAYS, BECAUSE THE TAX IS IMPOSED ON THE PRIVILEGE OF OPERATING MOTOR VEHICLES UPON THE PUBLIC HIGHWAYS. (35 ILCS 505/2). IN THE CONTEXT OF A MOTOR FUEL TAX REFUND CLAIM, THE ABOVE-CITED STATUTORY PROVISION REQUIRES A FILING PARTY TO PROVIDE FACTUAL INFORMATION RELATING TO THE FUEL PURCHASE, ALONG WITH

OTHER INFORMATION THAT THE DEPARTMENT MAY REASONABLY REQUIRE, AND THE DEPARTMENT IS AUTHORIZED TO INVESTIGATE THE CORRECTNESS OF THE INFORMATION PROVIDED IN CONJUNCTION WITH SUCH CLAIM. WHEN A BUSINESS IS MAINTAINING THAT IT PURCHASED FUEL TAX-PAID AND THEN USED SOME FOR AN OFF-HIGHWAY PURPOSE, THE INFORMATION THAT SHOULD BE MAINTAINED INCLUDES VERIFIABLE RECORDS THAT SHOW THE NUMBER OF OFF-HIGHWAY MILES DRIVEN BY TAXPAYER VEHICLES. THESE RECORDS MUST BE CAPABLE OF BEING INVESTIGATED AND AUDITED BY THE DEPARTMENT. WHEN A TAXPAYER HAS MACHINES OR VEHICLES THAT IT USES OFF-HIGHWAY IN AGRICULTURAL OR OTHER COMMERCIAL OPERATIONS, IT MUST KEEP RECORDS OF THE NUMBER OF OFF-HIGHWAY TRIPS THE VEHICLES MAKE AND THE NUMBER OF MILES FOR EACH TRIP, BECAUSE THESE FACTORS WHEN MULTIPLIED YIELD THE NUMBER OF OFF-HIGHWAY MILES WHICH, DIVIDED BY THE MILES PER GALLON, YIELDS THE NUMBER OF GALLONS OF FUEL ELIGIBLE FOR THE OFF-HIGHWAY FUEL USAGE CREDIT.

MOTOR FUEL CAN ALSO QUALIFY FOR THE OFF-HIGHWAY CREDIT WHEN IT IS UTILIZED IN OPERATING A DEVICE OR MOTOR THAT ITSELF DOES NOT PROPEL THE VEHICLE BUT RATHER OPERATES A MECHANISM FOR A FUNCTIONAL PURPOSE SUCH AS A PUMP OR COMPRESSOR. WHEN THE MOTOR FUEL FOR SUCH A USE COMES FROM THE SAME FUEL TANK THAT DISPENSES THE FUEL TO THE ENGINE THAT PROPELS THE VEHICLE UPON THE HIGHWAYS, A TAXPAYER MUST MAINTAIN RECORDS TO SUBSTANTIATE THE NON-HIGHWAY USAGE. THIS IS THE SITUATION HERE AS THE ALLEGED OFF-HIGHWAY FUEL USAGE WAS FILED FOR THE OPERATION OF POWER TAKE-OFFS WHICH ARE THE MECHANISMS USED TO SUPPLY THE POWER TO THE HYDRAULIC LIFT DEVICE FOR THE BEDS OF DUMP TRUCKS.

AS THE AUDITORS POINTED OUT IN THEIR TESTIMONY (TR. PP. 40-48), WHAT IS REQUIRED IN THIS TYPE OF CASE WOULD BE DOCUMENTARY EVIDENCE THAT ESTABLISHES THE HORSEPOWER REQUIRED TO OPERATE THE POWER TAKE-OFF

MOTORS, THE AMOUNT OF FUEL USED IN SUCH OPERATION, AND THE NUMBER OF SUCH USAGES. THEN THE FUEL USED MULTIPLIED BY THE NUMBER OF USAGES WOULD YIELD THE AMOUNT OF FUEL THAT COULD BE THE SUBJECT OF A MOTOR FUEL TAX REFUND APPLICATION, SO LONG AS THAT SAME FUEL HAD NOT ALREADY BEEN LISTED ON LINE 7A AND USED AS GALLONAGE TAKEN AS A CREDIT BY THE SAME TAXPAYER ON ITS IDR-280 MOTOR FUEL USE TAX RETURN.

THE DEPARTMENT'S CORRECTION OF RETURNS OR DETERMINATION OF MOTOR FUEL TAX DUE FOR THE TWO AUDIT PERIODS AND ITS NOTICE OF DENIAL OF CLAIM WERE INTRODUCED INTO EVIDENCE WITHOUT OBJECTION BY THE TAXPAYER (TR. P. 8; DEPT. EX. NOS. 1, 2 AND 5), AND THIS ESTABLISHED THE PRIMA FACIE CASE OF THE DEPARTMENT. BECAUSE TAXPAYER SUBMITTED NO DOCUMENTATION IN THE FORM OF BOOKS AND RECORDS TO SUPPORT ITS CONTENTION OF OFF-ROAD USAGE, I MUST CONCLUDE THE PRIMA FACIE CASE OF THE DEPARTMENT HAS NOT BEEN REBUTTED. THIS CONCLUSION IS PURSUANT TO EVIDENTIARY STANDARDS THAT THE ILLINOIS APPELLATE AND SUPREME COURTS HAVE ESTABLISHED FOR THESE TYPES OF CASES. COPILEVITZ V. DEPARTMENT OF REVENUE, 41 ILL.2D 154 (1968); FILlichio V. DEPARTMENT OF REVENUE, 15 ILL.2D 327 (1959) AFTER INTRODUCTION OF THE CORRECTED RETURN, THE BURDEN OF GOING FORWARD WITH THE EVIDENCE SHIFTS TO THE TAXPAYER, WHO MUST THEN INTRODUCE COMPETENT DOCUMENTARY EVIDENCE TO SHOW THAT THE NOTICE OF TAX LIABILITY IS NOT CORRECT, AND THE EVIDENCE PRESENTED BY THE TAXPAYER MUST INCLUDE SOME DOCUMENTARY EVIDENCE FROM ITS BOOKS AND RECORDS RELATING TO THE TAX AT ISSUE. CONSISTENT WITH THESE EVIDENTIARY STANDARDS IS THE APPELLATE COURT (SECOND DISTRICT) CASE OF LAKELAND CONSTRUCTION CO., INC., V. THE DEPARTMENT OF REVENUE, 62 ILL. APP.3D 1036 (2ND DIST. 1978), WHICH INVOLVED A DEPARTMENT AUDIT OF MOTOR FUEL TAX LIABILITY ON A TAXPAYER WHO OWNED 2 GRAVEL PITS, AND ONE ISSUE WAS IF ANY OF THE FUEL WAS USED IN NON-ROAD VEHICLES. THE TAXPAYER DID NOT INTRODUCE

ANY RECORDS FROM ITS OWN BOOKS TO SUBSTANTIATE THE ALLEGED NON-ROAD USAGE OF MOTOR FUEL AND THE COURT HELD IT WAS PROPER FOR THE DEPARTMENT TO NOT GIVE THE TAXPAYER ANY CREDITS FOR THE ALLEGED NON-ROAD USAGE. LAKELAND AT 1039-1040.

SIMILARLY, IN THE INSTANT NTL MATTERS, THE TAXPAYER HAS NOT SUBMITTED DOCUMENTARY EVIDENCE FROM ITS OWN RECORDS TO SHOW THAT IT IS ENTITLED TO CREDIT FOR NON-ROAD USAGE. FOR THE CLAIM MATTER HEREIN, THE INTRODUCTION OF THE DEPARTMENT'S NOTICE OF CLAIM DENIAL ESTABLISHED ITS PRIMA FACIE CASE AND THE TAXPAYER'S FAILURE TO INTRODUCE DOCUMENTARY EVIDENCE IN THE FORM OF ITS BOOKS AND RECORDS MEANS IT DID NOT REFUTE THE DEPARTMENT'S PRIMA FACIE CASE.

REGARDING THE "TIME STUDY" SUBMITTED BY THE CONSULTANT WITH THE SECOND AND SUBSEQUENT CLAIM, I FIND IT WAS PROPER FOR THE DEPARTMENT TO NOT ACCEPT IT BECAUSE IT IS NOT SUPPORTED BY VERIFIABLE DOCUMENTARY EVIDENCE AND IT ALSO USES A MUCH HIGHER AMOUNT OF AVERAGE NON-HIGHWAY TIME THAN WAS STATED BY TAXPAYER IN HIS TESTIMONY AT HEARING. (TR. PP. 11, 14; DEPT. EX. NO. 5, P. 4)

IN SUMMARY, FOR EACH MATTER HEREIN, I FIND THE DEPARTMENT'S PRIMA FACIE CASE HAS NOT BEEN OVERCOME BY THE TAXPAYER. A USER OF MOTOR FUEL HAS THE BURDEN OF PROVING THAT THE USE TO WHICH HE PUT IT WAS FOR A PURPOSE OTHER THAN THE OPERATION OR PROPELLING OF A MOTOR VEHICLE UPON THE HIGHWAYS, PASCAL V. LYONS, 15 ILL.2D 41, 46, (1958), AND I FIND TAXPAYER HAS NOT MET THAT BURDEN HERE.

RECOMMENDATION

BASED UPON THE FINDINGS OF FACT AND CONCLUSIONS OF LAW STATED ABOVE, I RECOMMEND THE DEPARTMENT FINALIZE NOTICE OF TAX LIABILITY NOS. XXXXX AND

XXXXX IN THEIR ENTIRETY, AND I ALSO RECOMMEND THAT THE DEPARTMENT'S
DENIAL OF TAXPAYER'S CLAIM FOR REFUND BE UPHELD.

KARL W. BETZ
ADMINISTRATIVE LAW JUDGE